The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oakland Scavenger Company--Request for Reconsideration

File: B-232958.2

Date: June 1, 1989

DIGEST

Request for reconsideration of prior dismissal as untimely of protest objecting to agency's decision to procure services competitively is denied notwithstanding protester's contention that it lacked actual notice of the competition, since protester had actual knowledge that previous procurements were competitive and nothing in the record shows that the protested solicitation differs from the prior solicitations, and notice of the procurement was published in the Commerce Business Daily without any indication that procurement was to be noncompetitive.

DECISION

Oakland Scavenger Company requests reconsideration of our February 1, 1989, dismissal of its protest of the United States Coast Guard's competitive procurement of refuse collection and disposal services for Coast Guard Island, Alameda, California, under invitation for bids (IFB) No. DTCG89-88-B-90037, Oakland Scavenger Co., B-232958, Feb. 1, 1989, 89-1 CPD ¶ 101. We deny the request for reconsideration.

In its original protest, Oakland contended that the solicitation was improper because Coast Guard Island is located within the city limits of Alameda, which has granted an exclusive franchise for refuse collection and transportation to Oakland. Nevertheless, Oakland participated throughout the competitive procurement process and did not object to it until well after bid opening when the process had been concluded and Oakland learned that it would not receive the award.

In our initial decision we concluded that Oakland should have known that it would not receive a sole-source contract for the services when the agency issued a competitive

solicitation for the requirement. Consequently, we dismissed the protest as untimely because it involved an apparent solicitation impropriety which under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988), must be filed before bid opening. We declined to invoke the significant issue exception to our timeliness rules, see 4 C.F.R. § 21.2(b), since we had previously considered the issue raised, and did not think that the protest raised an issue of widespread interest to the procurement community.

In its request for reconsideration, Oakland contends both that the dismissal was erroneous, and that the issue raised should be considered significant. Oakland first argues that we erroneously assumed that it was aware of the competitive nature of the procurement. Oakland claims that it was unaware that the procurement was being conducted on a competitive basis until after award was made to another bidder, and that receipt of the solicitation did not provide notice that it faced competition within the territory of its exclusive franchise, since there was no indication in the solicitation that it had been sent to other bidders. Consequently, Oakland contends that its protest was timely filed since the allegedly defective nature of the procurement was not apparent on the face of the solicitation and only became apparent after bid opening.

We see no merit in Oakland's assertion that an "invitation for bids" must explicitly state that it is being sent to other bidders before it can be deemed to provide notice of an agency's intent to obtain competition. On the contrary, we think that a reasonable bidder must assume that an IFB seeks competition unless it states otherwise since its obvious purpose is to invite more than a single bid from a single source. See Federal Acquisition Regulation (FAR) § 6.401(a)(4).

There are additional factors which demonstrate that the protester should be charged with constructive notice of the competitive nature of the procurement. First, the agency has competed the requirement since 1982, and awarded the 1983 and 1984 contracts to another firm. The protester had actual knowledge of the prior procurements since it was the awardee on the 1985, 1986 and 1987 contracts. Nothing in the record evidences an intent by the agency to deviate from its prior competitive practice. For example, there is no evidence that the instant solicitation differs in any respect from the previous competitive solicitations.

Second, the agency advertised the requirement in the Commerce Business Daily (CBD) on June 30, 1988, well before bid opening on September 13. The Competition in Contracting

Act of 1984 (CICA) increased the role and importance of the CBD notice in the procurement system. Under CICA, agencies are required, when procuring property or services, to obtain full and open competition. 41 U.S.C. § 253(a)(1)(A) (Supp. IV 1986). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." 41 U.S.C. §§ 259(c) and 403(7). In furtherance of this requirement, CICA requires agencies to publicize in the CBD their intent to solicit contracts where the price is expected to equal or exceed $25,000 so that qualified firms will be aware of the government's requirements. 41 U.S.C. § 416. If the procurement is to be noncompetitive, the CBD notice must so indicate. FAR § 5.207(c)(2)(xiii). Accordingly, potential bidders or offerors should regard a CBD synopsis as indicating that the government is seeking competition for the stated requirement unless the synopsis states that it has some other purpose. Moreover, publication of a CBD synopsis constitutes constructive notice to potential offerors of a solicitation and its contents. S.T. Research Corp., B-232751, Oct. 11, 1988, 88-2 ¶ 342. Accordingly, once the CBD synopsis was published in this case, Oakland was on constructive notice that the agency was conducting a competitive procurement.

We see no merit in the protester's further contention that the protest is timely because it challenges the illegal award, rather than the competition itself. In our view, the basis of the protest is the fundamental cause of the alleged impropriety (the competition) and not some later consequence of it (award to another bidder). In this regard, we have long held that a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions. See Patterson Construction Co., B-180290, Feb. 28, 1974, 74-1 CPD ¶ 113. Since Oakland had constructive notice that the agency was seeking competition, and not merely sending a single solicitation to Oakland, we view the protest as untimely.

Finally, we remain of the view that this protest does not fall within the significant issue exception to our timeliness rules. Whether a protest presents a significant issue is necessarily determined on a case-by-case basis; we will, in a given case, invoke the exception when our consideration of the protest would be in the interest of the procurement system. Hunter Environmental Services, Inc., B-232359, Sept. 15, 1988, 88-2 CPD ¶ 251. Here, we fail to see how our consideration of the protest, which concerns only whether this protester is entitled to a sole-source award

under this particular procurement, would be in the interest of the procurement system so as to justify invoking the exception.

The request for reconsideration is denied.

James F. Hinchman
General Counsel